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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 848

ERNEST GAILLARD, JR., and MIGNONNE NASH GAILLARD,
Petitioners,

VERSUS

FREDDIE MORGAN FIELD, Administratrix of the Estate of Fred Morgan, Deceased,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WILLIAM WALTER HENTZ, JR.
FRANCIS S. IRVINE
1500 Kermac Building
Oklahoma City, Oklahoma 73102
Attorneys for Petitioners

January, 1968

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-0030

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This brief is in reply to Respondent's brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

ARGUMENT

Respondent, as she did in the courts below, has attempted to cloud the issue in this cause by asserting that petitioners have sued to set aside as void only those transactions which were unprofitable to them and are retaining the profitable transactions. Such assertions do not appear in the argument section of the brief in opposition but are set forth in the guise of facts under respondent's Statement of the case.

The same appeal was made to the Court of Appeals and was rejected by that Court since it did not even consider the question in its opinion, but rather decided the matter on the ground that the difference accorded by California and Oklahoma to oil and gas transactions made it appear "that application of California law to void the letter agreements and assignments would violate a deep-rooted tradition of the common weal in Oklahoma" (Appendix B of Petition, p. xi).

In the Statement of the Case in the Petition for Certiorari, petitioners have set forth the details of the purchase of interests in the James lease in Lincoln County, Oklahoma, and the Lingerfelt and Tiffin leases in Pottawatomie County, Oklahoma (Petition, pp. 4-5). As recounted there and shown in the record, the interests in the Lingerfelt and Tiffin leases were purchased from Mr. Bob Field, an employee and son-in-law of Fred Morgan, as an independent transaction, and Mr. Morgan had no interest in the leases or the transaction other than bringing the parties together (R. 181-182, 232). The James lease was included in a plan of unitization and was being produced and operated by Gulf Oil Corporation as a part of such plan. Fred Morgan purchased an interest in the James lease from a third party for his wife, but instead sold the interest to the petitioners and acted as an intermediary when petitioners purchased a second interest in the lease (R. 212-213).

Section 26100 of the Corporations Code of California provides:

> "Every security of its own issue sold or issued by any company without a permit of the Commissioner

then in effect authorizing the issuance or sale of the security is void" (Petition, Appendix A, p. iii).

The California Courts have consistantly interpreted the word "void" to mean *voidable at the option of the purchaser. Domestic and Foreign Petroleum Co.* v. *Long,* 4 Cal.2d 547, 51 P.2d 73 (1935); *Langharn* v. *Bank of America Nat'l Trust & Savings Ass'n,* 88 F.2d 551 (9th Cir. 1937); *Julian* v. *Schwartz,* 16 Cal. App.2d 310, 60 P.2d 887 (1936). It is under this section of the California statutes that petitioners have elected to void and rescind the sales of securities to them by Fred Morgan.

Even the most cursory glance at the facts shows that Fred Morgan did not own any of the interests sold to the petitioners in the Lingerfelt and Tiffin leases or in the second interest purchased by petitioners in the James lease. They cannot conceivably be securities of his own issue sold by Fred Morgan, and they are not subject to the voiding provisions of the statute.

Further, although Fred Morgan owned the first interest in the James lease for a brief period he did not have the control, supervision or operation of the interest. This was vested in Gulf Oil Corporation under the plan of unitization. Thus under the California decisions this interest was not a security. *Domestic and Foreign Petroleum Co.* v. *Long,* 4 Cal.2d 547; 51 P.2d 73 (1935); *Moore* v. *Stella,* 52 Cal. App.2d 766, 127 P.2d 300 (1942). What it really represented was best expressed by Mrs. Ray Cole, wife of Fred Morgan, during the period when he sold the first James lease interest to petitioners, when she testified concerning conversations with Fred Morgan after he became acquainted with petitioners:

Q. "What was said, if anything, in connection with obtaining any properties for Dr. and Mrs. Gaillard?

A. He said 'the wise thing' . . .

Q. You say 'he said.' Who was that?

A. Mr. Morgan. He said, 'the only thing to do, he was first going to get them a sure thing * * * that he was going to let Dr. Gaillard have the James lease, he wanted him to have it because he wanted to get him a good paying lease; that he would go ahead and get these other friends of us (*sic*) to start spending money for the wildcat investments . . .'." (R. 99-100, 207).

Respondent, to further becloud the issue, set out in detail the testimony of one of the petitioners, Dr. Gaillard, concerning the initial cost of the interests in the James lease as compared to the gross return from said interests. What respondent carefully failed to show was the fact that petitioners paid out large sums in operating expense and that the gross return does not present either a fair or an accurate picture (R. 96-97). It represents merely a large number which respondent apparently hopes will influence the Court.

If, however, we assume that the interests in James, Lingerfelt and Tiffin leases were securities of Morgan's own issue and thus subject to the voiding provisions of Section 26100, the petitioners *were not required* to include them in this proceeding. As shown above California Courts have held the word "void" to mean "voidable at the option of the purchaser." As the sale of each interest constitutes the sale of a separate security, each such sale is voidable at the option of the petitioners without reference to any other sale or sales.

The interests in the James, Lingerfelt and Tiffin leases, whether profitable or unprofitable, are quite simply not a part of this action.

Respondent's Proposition No. 1

Respondent urges as her Proposition No. 1 that the full faith and credit clause of the Constitution does not set aside the law of comity which denies petitioners the right to enfore the California Securities Statute in this case where (A) there is no comparable substantive or statute law, or (B) such California local law is contrary to public policy or would work an unjust hardship upon a citizen of the Oklahoma jurisdiction.

To support this contention, the respondent cites *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Wallace*, 223 U.S. 481, 56 L.Ed. 516, 32 S.Ct. 205 (1912); *Fowler* v. *Lamson*, 164 U.S. 252, 41 L.Ed. 424, 17 S.Ct. 112 (1896); *Carroll* v. *Lanza*, 349 U.S. 408, 99 L.Ed. 1183, 75 S.Ct. 804 (1955); and *Hoppeston Canning Co.* v. *Cullen*, 318 U.S. 313, 87 L.Ed. 777, 63 S.Ct. 602 (1943).

In *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Wallace, supra*, the question before the Court, as noted by the language quoted by respondent, was "whether a state court may enforce a right of action arising under an Act of Congress." The Court then stated "that the jurisdiction of state courts extends to the hearing and determination of any civil and transitory cause of action created by a foreign statute, provided it is not of a character opposed to the public policy of the state in which the suit is brought."

The petitioners submit that this language merely recognizes the general rule that a foreign law may be denied

enforcement on the basis of the public policy of the forum, but it is certainly not an expression of what is "public policy" and in what specific instances such policy may be applied.

The respondent cites *Fowler* v. *Lamson, supra,* and contends that the Supreme Court there refused to overrule the Illinois Supreme Court where it had refused to enforce "a statutory liability under a Kansas statute providing for a special remedy against the stockholders." The quotation from the opinion as set out in respondent's brief is very much out of context. In such quotation, the Court was merely reviewing what action was taken in the Illinois Court as could be determined from the record before them. After reviewing the record, this Court stated:

> "It will be seen that there are no pleadings in the record; no evidence is returned; no exceptions to any decision of the court are to be found; no request to the court to find upon any federal question; no refusal of the court to find, and no finding upon, any such question. Thus, there is an entire absence in this whole record of any fact showing that the supreme court of Illinois, or either of the lower courts, decided any federal question whatever. * * *" 17 S.Ct., at p. 113.

This Court then denied jurisdiction. As can be easily seen, this Court made it quite clear that from the *record before you,* no federal question was presented for its determination, and there is certainly no expression by this Court on the subject of full faith and credit.

In *Carroll* v. *Lanza, supra,* an employee was employed in Missouri but injured in Arkansas. The Missouri Compensation Act provided that the parties to such an employ-

ment contract made in Missouri shall be presumed to have elected to accept its provisions. After the employee was injured in Arkansas, he brought suit against a third party for common-law damages, an action that would have been barred by the Missouri Compensation Act. In answer to the contention that Missouri law applied, this Court stated:

> "* * * Arkansas, the State of the forum, is not adopting any policy of hostility to the public Acts of Missouri. It is choosing to apply its own rule of law to give affirmative relief for an action arising within its borders.
>
> "Missouri can make her Compensation Act exclusive, if she chooses and enforce it as she pleases within her borders. Once that policy is extended into other States, different considerations come into play. Arkansas can adopt Missouri's policy if she likes. Or, as the Pacific Employees Insurance Co. case teaches, she may supplement it or displace it with another, insofar as remedies for acts occurring within her boundaries are concerned. Were it otherwise, the State where the injury occurred would be powerless to provide any remedies or safeguards to nonresident employees working within its borders. We do not think the Full Faith and Credit Clause demands that subserviency from the State of the injury." 349 U.S., at 413-414.

It is clear from the above language that the controlling point was the forum's right to apply its own law to an injury that occurred within its boundaries. It is difficult to see how the decision is applicable to the instant situation where the forum state had few, if any, contracts with the transactions which constitute the sale of securities to California residents in the State of California. Indeed, it certainly could be said that there is every reason con-

ceivable to apply California law herein to protect California residents from prohibited transactions occurring in California.

In *Hoopeston Canning Company* v. *Cullen, supra,* the appellant was contending that the New York courts could not apply New York law to a contract of insurance made in Illinois, even though such insurance contract covered property in the State of New York. This Court held that New York had authority over property within its borders and stated that "(C)ontracts formerly made in other states may remain subject to the law of the state of the situs of the property, particularly in respect to immoveables."

It is apparent why respondent has cited the above language from *Hoopeston.* She is relying on the false premise that the performance of the contract herein was the drilling of oil and gas wells. It is just as apparent that she has failed to meet the issue involved in this action. As *Hoopeston* holds, a state has authority over property within its borders, but this decision is not applicable to the transaction herein which constituted the sale of securities in the State of California. There is absolutely no issue in this suit concerning Oklahoma's (or any of the other states where wells were to be drilled) authority over the oil and gas wells drilled on the property in which interests were purchased by the petitioners.

The cases cited by respondent wholly fail to sustain respondent's Proposition No. 1 and the question remains to be answered by this Court as to whether the refusal of the courts below to enforce the law of California violates the Full Faith and Credit Clause of the Constitution of the United States.

Likewise remains the question whether the public policy of Oklahoma refuses recognition of the law of California which recognizes a certificate of interest in an oil, gas or mining title or lease as a security, when Oklahoma does not recognize such an interest as a security.

The reasons for granting the writ as outlined in the petition are unassailed and pertinent and petitioners renew their prayer that the petition for writ of certiorari be granted.

Respectfully submitted,

WILLIAM WALTER HENTZ, JR.
FRANCIS S. IRVINE
1500 Kermac Building
Oklahoma City, Oklahoma 73102

Attorneys for Petitioners

January, 1968